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NO JS-6

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

NACIMIENTO WATER COMPANY, INC.,)	Case No. CV 13-07959 DDP (MRWx)
)	
Plaintiff,)	ORDER GRANTING MOTION TO EXPUNGE
)	LIS PENDENS
v.)	
)	
INTERNATIONAL FIDELITY)	
INSURANCE CO. A New Jersey)	[Dkt. 54]
Corporation,)	
)	
Defendant.)	
)	

Presently before the court is Cross-Defendant Oak Shores SPE, LLC's Motion to Expunge Lis Pendens. Having considered the submissions of the parties and heard oral argument, the court grants the motion and adopts the following order.

I. Background¹

In 2003, Jonatkim Enterprises, the developer of a residential subdivision in San Luis Obispo County, entered into a contract with Plaintiff Nacimiento Water Company ("the Water Company"). Under

¹ The facts herein are drawn from the Complaint and from the Second Amended Counterclaim and Cross Complaint.

1 the contract (the "Water Contract"), the Water Company agreed to
2 provide water service to the residential lots in exchange for
3 payment of \$5,000 per lot, to be paid within four years of the
4 recordation of the subdivision's final tract map. The contract
5 also required the issuance of a \$500,000 performance bond, which
6 was issued by International Fidelity Insurance Company ("IFIC") on
7 the developer's behalf.

8 Developer Jonatkim made a partial payment to the Water
9 Company, but then transferred its interest in the subdivision to
10 John and Carol King ("the Kings"). The Kings also assumed
11 Jonatkim's obligations under the Water Contract, and obtained a
12 surety bond from IFIC similar to that originally issued to
13 Jonatkim. The Kings also agreed to indemnify IFIC for any losses
14 connected to the bond and agreed to assign to IFIC, in the event of
15 a breach, all of their rights in the Water Contract. The mortgage
16 lender eventually foreclosed on the property, which was then
17 obtained at a foreclosure sale by Movant Oak Shores SPE, LLC ("Oak
18 Shores").²

19 In 2010, the Water Company notified IFIC that Jontakim and its
20 successors had defaulted on the Water Contract. The Water Company
21 therefore demanded \$305,000 pursuant to the IFIC performance bond.
22 IFIC did not pay the Water Company, which then filed the instant
23 suit to recover under the bond.³

26 ² Oak Shores did not acquire the property until December 2013,
27 after the filing of the Water Company's Complaint and IFIC's Cross-
28 Claim.

³ IFIC alleges that the amount at issue is \$310,000.

1 IFIC filed a counterclaim and cross claim against the Water
2 Company, Jonatkim, the Kings, and Oak Shores. IFIC, claiming
3 subrogation rights to collect the \$5,000 per lot, also filed a
4 notice of lis pendens regarding the subdivision.⁴ Oak Shores now
5 moves to expunge the lis pendens.

6 **II. Legal Standard**

7 Lis pendens matters are governed by state law. 28 U.S.C. §
8 1964. Under California law, "[a] party to an action who asserts a
9 real property claim may record a notice of pendency of action in
10 which that real property claim is alleged." Cal. Code Civ. P. §
11 405.20. A lis pendens "clouds the title and effectively prevents
12 the property's transfer until the litigation is resolved or the lis
13 pendens is expunged." BGC Assocs. LLC v. Superior Court, 75
14 Cal.App. 4th 952, 967 (1999).

15 Any party to an action, or nonparty with an interest in the
16 real property affected by the lis pendens, may move to expunge a
17 lis pendens. Cal. Code Civ. P. § 405.30. The court must grant a
18 motion to expunge if (1) "the pleading on which the notice is based
19 does not contain a real property claim," or (2) "the claimant has
20 not established by a preponderance of the evidence the probable
21 validity of the real property claim." Cal. Code Civ. P. §§ 405.31,
22 405.32..

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27 ⁴ IFIC's Second Amended Counterclaim and Crossclaim alleges
28 that IFIC shall have the right to recover under the water contract
if it makes any payment to the Water Company. IFIC does not allege
that it has made any such payment.

1 **III. Discussion**

2 A. Expungement

3 Oak Shores contends that IFIC has not brought any real
4 property claims. It is IFIC's burden, as the party opposing the
5 motion to expunge, to show the existence of a real property claim.
6 Kirkeby, 33 Cal.4th 642, 647 (2004). The California Code of Civil
7 Procedure defines a "real property claim" as "the cause or causes
8 of action in a pleading which would, if meritorious, affect (a)
9 title to, or the right to possession of, specific real property or
10 (b) the use of an easement identified in the pleading, other than
11 an easement obtained pursuant to statute by any regulated public
12 utility." Cal. Code. Civ. P. § 405.4.

13 IFIC argues, conclusorily, that "[i]t is plain that the IFIC's
14 claim affects real property." (Opposition at 10:1.) IFIC suggests
15 that because the Water Contract allows the Water Company to refuse
16 to provide water to the subdivision, and that refusal would
17 "impos[] restrictions on the use and subdivision of the real
18 property in issue," IFIC has brought a "real property claim." It
19 is unclear to the court, however, how a service contract such as
20 the Water Contract has any bearing on title to the property or the
21 right to possession of the property. While lack of water service
22 would likely reduce the value of the property, lack of water in and
23 of itself does not affect title to or right to possession of a
24 property.

25 The cases cited by IFIC are inapposite. Cornbleth v. Allen,
26 in which a notice of lis pendens was not at issue, held that an
27 agreement limiting the uses of a property and providing for a
28 reversionary interest was an instrument affecting title. Cornbleth

1 v. Allen, 80 Cal.App. 459, 463 (1926). In Barbieri v. Ongaro,
2 another case not involving a lis pendens, the court held that a
3 restrictive covenant running with the land affected real title, and
4 was recordable. Barbieri v. Ongardo, 208 Cal.App.2d 753, 757
5 (1962); See also Alfaro v. Cmty. Hous. Improvement Sys. & Planning
6 Ass'n, Inc., 171 Cal.App.4th 1356, 1372-3 (2009). While IFIC
7 appears to suggest that lack of water service would limit the uses
8 of the property at issue here, that practical limitation is not
9 analogous to the restrictive covenants at issue in the cases IFIC
10 cites. Because IFIC has not brought a real property claim, the lis
11 pendens must be expunged.⁵

12 B. Attorney's Fees

13 The court must award reasonable attorney's fees and costs
14 related to a motion to expunge a lis pendens to the prevailing
15 party, unless the other "acted with substantial justification or .
16 . . other circumstances make the imposition of attorney's fees and
17 costs unjust." Cal. Code Civ. P. § 405.38. Though this court
18 disagrees with IFIC's contentions, is lis pendens does not appear
19 to have been filed frivolously or in bad faith. Oak Shores'
20 request for fees is, therefore, DENIED.

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28 ⁵ Having so concluded, the court need not reach Oak Shores'
additional arguments.

1 **IV. Conclusion**

2 For the reasons stated above, Oak Shores' Motion to Expunge
3 Lis Pendens is GRANTED. The request for attorney's fees is DENIED.
4 **IT IS SO ORDERED.**

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7 Dated: November 4, 2014

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HON. DEAN D. PREGERSON
United States District Judge